The Tax Institute

10 July 2026

The Hon Dr Jim Chalmers MP, Treasurer
C/- Budget Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: TaxChanges@treasury.gov.au

Dear Treasurer,

Review of capital gains tax reforms for innovative start-ups

The Tax Institute welcomes the opportunity to make a submission to the Treasury in respect of its consultation regarding the capital gains tax reforms – arrangements for innovative start-ups (**Consultation Paper**).

We recognise the important role that innovative start-ups play in fostering productivity, economic growth, job creation, and Australia's broader innovation ecosystem. We acknowledge the Government's objective of ensuring that the broader capital gains tax (**CGT**) changes do not inadvertently discourage investment in high-risk, high-growth innovative businesses. We also welcome the proposal to introduce a targeted Innovative Business CGT Concession (**IBCC**).

In particular, we support Treasury's recognition that founders, employees and early-stage investors play a crucial role in the start-up ecosystem, and that tax settings should continue to encourage participation in innovative businesses where growth potential may significantly exceed the initial investment or cost base.

While we support the policy objective of the proposed concession, we have concerns regarding several aspects of the proposed design. In particular, the current proposal relies on a number of subjective eligibility criteria that may create uncertainty for investors, increase compliance costs, and result in disputes many years after an investment has been made. Greater certainty at the time of investment will be crucial for the concession to achieve its intended objective.

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Consultation timing and increasing complexity

We note that the consultation period for these proposals has been only three weeks. This has occurred while stakeholders are still grappling with the broader CGT changes, and other related measures announced by the Government. It has also coincided with the financial year-end period, when taxpayers, businesses and advisers are managing significant compliance obligations.

As a result, there has been limited opportunity to fully consider the proposed concession and its interaction with the broader CGT changes. We are of the view that the Government should undertake further consultation on the detailed design of the concession before the measures are finalised, taking into account preliminary feedback provided at this stage.

More broadly, The Tax Institute has consistently advocated for simpler, standardised eligibility rules across the tax system, including, where possible, a single definition of small business. While we support measures that encourage investment in innovative start-ups, the proposed concession introduces additional thresholds, tests and integrity rules that apply only to this concession. The small business and CGT concession regimes are already complex. Adding new tests and thresholds unique to a single concession will increase compliance costs and make the system more difficult for taxpayers and advisers to navigate.

The growing number of innovation-related concessions, each with their own eligibility criteria and integrity rules, increases the importance of ensuring that the proposed IBCC aligns with existing regimes wherever possible. These include the Employee Share Scheme (**ESS**) Start-Up Concession, the Early-Stage Innovation Company (**ESIC**) regime, the Research and Development Tax Incentive (**R&DTI**), and the Venture Capital Limited Partnership (**VCLP**) and Early-Stage Venture Capital Limited Partnership (**ESVCLP**) programs.

The Government should consider whether the thresholds and tests for the proposed concession can be aligned with existing rules. This would help reduce complexity, improve certainty, and make the concessions easier for taxpayers and advisers to apply.

Summary of key findings and recommendations

We consider that several aspects of the proposed IBCC require further refinement to ensure the concession can achieve its intended policy outcomes. Our key findings are summarised below.

Simplicity and alignment with existing regimes should be a key design principle

The proposed concession introduces additional eligibility criteria, thresholds and integrity rules into an already complex area of the tax law. The Government should consider aligning the thresholds and tests for the IBCC with existing innovation and small-business tax measures, wherever possible, to reduce compliance costs and improve certainty.

Investor certainty should be the primary design principle

The proposed concession relies heavily on subjective eligibility criteria that may not be tested until many years after an investment has been made. Investors require certainty at the time decisions are made, rather than retrospective assessment when a capital gain is eventually realised. We strongly recommend introducing a binding certification or approval mechanism to provide certainty regarding eligibility.

The proposed innovation test may be difficult to administer

The innovation principles may be particularly challenging for founders and early-stage businesses to satisfy and document. The proposed criteria rely on subjective concepts and may create uncertainty for businesses, investors and advisers. A more objective approach should be considered.

The proposed age and turnover thresholds require further consideration

There is merit in targeting the concession to businesses with turnover below $50 million and that are less than 10 years old, as businesses beyond these thresholds may generally be expected to have progressed beyond the start-up phase. However, a strict incorporation-age test may not adequately accommodate businesses with longer development and commercialisation timelines or those that undertake legitimate restructures as they grow. The operation of these rules should be reviewed to ensure they appropriately target innovative businesses without creating unintended outcomes.

Record-keeping obligations may be excessive

The proposed framework relies heavily on historical company records to substantiate eligibility many years after shares are issued. Investors may not have access to the information required to support their claims when a CGT event occurs. The legislation should provide clear evidentiary and record-keeping rules.

The proposed rules may discourage follow-on investment and create uncertainty for restructures

The consultation paper does not clearly explain how the concession will apply to subsequent funding rounds, corporate restructures, acquisitions and successor entities. Additional guidance and continuity rules may be required to ensure investors are not disadvantaged by legitimate commercial transactions.

Further consideration should be given to founders and significant investors

Founders are identified as a key target group for the concession. However, significant investors may be required to choose between the IBCC and the small business CGT concessions. It is unclear how much additional benefit the IBCC will provide in these circumstances, and further clarification is required.

The administration of the lifetime cap requires further consideration

The proposed lifetime cap may add to the growing number of tax attributes that taxpayers and advisers must track over extended periods. Clear administrative rules and reporting mechanisms will be required to minimise compliance costs.

Transitional arrangements should minimise valuation and compliance costs

While the proposed transitional rules are a welcome attempt to simplify eligibility for existing investments, they may introduce additional valuation dates and record-keeping obligations. Greater alignment with the broader CGT changes should be considered to reduce duplication and compliance costs.

Further guidance is required on interactions with existing innovation incentives

The proposed IBCC will operate alongside existing regimes, including the ESS Start-Up Concession, ESIC regime, R&DTI and VCLP/ESVCLP programs. Greater clarity is required regarding how these regimes interact and whether eligibility criteria can be better aligned.

Additional guidance is required for carried interest arrangements

The consultation paper proposes extending the IBCC to carried interest received by general partners of VCLPs and ESVCLPs. However, it does not explain how key features of the concession, including the holding period, innovation requirements and lifetime cap, will apply to carried interest arrangements. Specific rules may be required.

Foreign investment implications should be considered

The exclusion of foreign residents from the IBCC raises broader questions about the interaction between the concession and the Government's objectives to encourage investment in innovative Australian businesses. The Government should consider whether any unintended impacts on foreign investment may arise.

Our overarching recommendation is that the final design of the IBCC should prioritise certainty, administrability and objective eligibility criteria. A concession that can be relied on at the time of investment will be significantly more effective in encouraging participation in innovative Australian businesses than one that remains vulnerable to retrospective review many years later.

Our detailed responses to questions raised in the Consultation Paper are contained in **Appendix A**.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all.

If you would like to discuss any of the above, please contact our Tax Counsel,
John Storey, at (02) 9602 2003.

Yours faithfully,

Julie Abdalla

Head of Tax & Legal

APPENDIX A

We have set out below our detailed comments and observations for your consideration.

Response to Consultation Questions

Question 1 – Does the proposed Innovative Business CGT Concession (IBCC) provide an appropriate arrangement to support investment in innovative start-up businesses in the context of the Government's CGT reforms and other support for innovative start-ups?

The proposed concession is a welcome recognition that innovative start-ups may be uniquely impacted by the proposed CGT changes, and that additional measures are required to preserve incentives for investment in high-growth businesses.

However, we are concerned that the cumulative effect of the age test, innovation test, independence requirements, holding period rules, and lifetime cap may create significant complexity for investors and advisers.

We are also concerned that the proposed arrangements introduce additional complexity into an already highly complex taxation framework governing investment in companies generally, and innovative start-ups specifically. While we support the policy objective, care should be taken to ensure that the concession does not create further layers of qualification criteria, valuation requirements and record-keeping obligations that may discourage participation, or increase compliance costs for founders, employees, investors and their advisers.

The success of the concession will ultimately depend on whether investors can determine eligibility with certainty at the time of investment, rather than many years later when a capital gain is realised.

Recommendation

We recommend that the Government consider designing the IBCC in a manner that:

- incorporates objective and clearly defined eligibility criteria;
- is simple to administer and apply in practice;
- minimises compliance and record-keeping burdens for taxpayers and investors; and
- provides certainty regarding eligibility at the time investment decisions are made.

We further recommend that the Government consider introducing a binding certification or approval mechanism that allows investors to rely on an upfront eligibility determination. This would reduce the risk of future disputes and instill confidence in the concession.

Question 2 – Does the 10-year age limit and turnover threshold of $50 million appropriately target small innovative start-ups?

The proposed turnover threshold broadly aligns with existing start-up concession settings and is likely to be appropriate in targeting smaller innovative businesses.

We recognise that views may differ regarding the appropriate age threshold. However, we also acknowledge that there is merit in the proposition that a company that has operated for more than 10 years and achieved turnover approaching $50 million should generally be expected to have progressed beyond the start-up phase and be capable of operating on a self-sustaining basis. The proposed thresholds broadly target businesses in the earlier stages of development. However, this may not be the case for all innovative businesses, particularly those operating in sectors with extended development and commercialisation cycles. Further, we note that the 10-year incorporation requirement may produce unintended outcomes.

Innovative businesses commonly evolve, pivot and restructure. New entities may be established for legitimate commercial reasons, including intellectual property management, capital-raising activities, commercialisation of new products, and broader group restructuring.

A strict incorporation-age test may create incentives for businesses to establish new entities to reset the qualification period while potentially excluding innovative businesses that remain in a genuine growth or commercialisation phase beyond ten years.

Recommendation

We recommend that the Government consider:

- whether incorporation age is the most appropriate eligibility criterion;
- alternative measures based on business activity, commercialisation stage or innovation lifecycle;
- specific rules for restructures and successor entities; and
- mechanisms that ensure investors are not disadvantaged by company-level decisions beyond their control.

Question 3 – What eligibility criteria for a longer 15-year age limit would be appropriate for firms in sectors such as biotech, medtech and deep tech that take longer to commercialise (for example, due to regulatory requirements)?

We support the Government's recognition that certain innovative sectors require significantly longer development and commercialisation periods before becoming commercially viable.

Businesses operating in the biotechnology, medical technology, and deep-tech sectors are often subject to lengthy research, testing, certification, and regulatory approval requirements that are not encountered by start-ups in other sectors.

Recommendation

We recommend that the Government consider applying any extended eligibility period using objective criteria linked to:

- recognised regulatory approval pathways;
- substantial research and development activities;
- patent development and commercialisation activities;
- participation in innovation programs; and
- industry-specific commercialisation requirements.

Clear legislative definitions should be adopted to minimise uncertainty and disputes.

Question 4 – Are the proposed innovation principles appropriate and workable?

While we support targeting the concession to genuinely innovative businesses, the proposed innovation principles may be difficult to administer in practice.

Experience with innovation-related tax incentives demonstrates that differing views on innovation can arise among taxpayers, administrators, and other government agencies.

The proposed innovation principles may be particularly difficult for founders and early employees to satisfy at the point a business is established. At the commencement of many start-ups, founders are seeking to develop an idea or proof of concept, and may not yet be in a position to demonstrate growth potential, scalability or global market opportunities. These challenges are especially pronounced in biotechnology, medical technology and other deep-tech sectors where commercial outcomes may remain uncertain for lengthy periods.

A particular concern is that eligibility may not be tested until a CGT event occurs many years after the original investment. At that point relevant records may no longer exist, key personnel may have left the business, and investors may have limited access to company information. Importantly, the practical burden of proving eligibility may fall on investors, even though the relevant evidence is generally held by the company.

Recommendation

We recommend that the Government consider:

- establishing a formal certification or approval mechanism;
- allowing eligibility to be determined at the time shares are issued;
- permitting investors to rely on that determination for tax purposes; and
- limiting retrospective challenges to cases involving fraud, misrepresentation or material omission.

Question 5 – Is the five-year minimum holding period appropriate to be consistent with a long investment horizon?

We support the Government's objective of encouraging long-term investment in innovative start-ups and recognise that innovative businesses often require investors to commit capital for extended periods before commercial returns are realised. However, start-up businesses commonly experience acquisitions, mergers, restructures and other commercial events before a five-year period has elapsed. Without appropriate exceptions, genuine long-term investors may lose access to the concession despite investing in ways that are consistent with the policy's intent.

Recommendation

We recommend that the Government consider retaining the five-year holding period but introducing relief measures for:

- corporate acquisition events;
- compulsory disposals;
- share-for-share exchanges;
- approved restructures; and

- other transactions beyond the investor's control.

Question 6 – Does the proposed $10 million lifetime cap appropriately balance support and integrity?

We acknowledge the policy rationale for a lifetime cap as a means of targeting the concession and maintaining integrity. While a lifetime cap may be appropriate from an integrity perspective, practical administration challenges should not be underestimated. Taxpayers and their advisers would need to monitor the utilisation of the IBCC over a lifetime, adding to the growing number of tax attributes that already require ongoing historical tracking, including transfer balance caps, the small business retirement CGT exemption, the small business CGT cap, and various trust election regimes. Consideration should be given to mechanisms that minimise compliance costs and facilitate reliable tracking of concession usage.

The consultation paper does not provide sufficient detail regarding administration of the cap, particularly where taxpayers hold interests through trusts, partnerships or employee share arrangements.

We also note that the practical impact of the proposed lifetime cap cannot be considered in isolation from the interaction between the IBCC and the small business CGT concessions. Significant investors, including founders holding 20 per cent or more of a company, may be required to choose between the IBCC and existing small business CGT concessions. As a result, the extent to which the $10 million lifetime cap operates as a meaningful limitation for these taxpayers is unclear. Further information on the expected utilisation of the IBCC by founders and other significant investors would assist in assessing whether the proposed cap appropriately balances support for innovation and integrity objectives.

Recommendation

We recommend that the Government consider:

- providing detailed administrative guidance;
- establishing clear reporting mechanisms;
- clarifying the treatment of indirect interests and trust structures;
- clarifying interaction with employee share arrangements;
- indexing the cap over time; and
- explaining how the proposed lifetime cap is expected to operate in practice for founders and other significant investors who may also be eligible for the small business CGT concessions.

Question 7 – Are the transition arrangements appropriate and workable?

We support transitional arrangements that recognise investments made before the commencement of the new regime. However, transitional arrangements will need to be sufficiently clear and practical to minimise compliance costs and avoid uncertainty.

Although it is helpful that qualification for pre-commencement shares may be assessed by reference to an innovation test at a specified cut-off date rather than requiring analysis of every historical share issue, the proposed approach introduces another valuation date and compliance point that taxpayers must track. Consideration should be given to aligning any testing date with the broader CGT change valuation date of 1 July 2027. Such alignment could reduce duplication of valuation exercises and compliance costs, particularly for shareholders in private companies who may already need to establish market values to apply the broader CGT change transitional rules from 1 July 2027. Further guidance is required where asset valuations may be necessary at multiple dates to satisfy both the active asset requirements of the IBCC and the broader CGT regime.

Recommendation

We recommend that the Government align transitional testing dates with the broader CGT change valuation framework wherever possible. The legislation should also provide clear rules regarding valuation requirements, including whether valuations prepared for one purpose may be relied on for another, to minimise duplication, compliance costs and uncertainty.

Additional issues not specifically addressed in consultation questions

Significant investors and the small business CGT concessions

The consultation paper provides that a significant investor, broadly a shareholder with a 20 per cent or greater interest, must choose between the small business CGT concessions and the IBCC when a capital gain is realised on their shares. The two concessions cannot be claimed together.

This raises questions as to the practical benefit of the IBCC for founders, who are specifically identified in the consultation paper as a key group the concession is intended to support. Founders commonly hold interests of 20 per cent or more and may therefore be eligible for the small business CGT concessions where the relevant conditions are satisfied. Depending on the circumstances, concessions such as the 50 per cent active asset reduction and the retirement exemption may provide a more favourable outcome than the IBCC. As a result, some founders may derive little benefit from the proposed concession.

The proposed interaction also introduces additional complexity. A founder may not be able to determine at the time an investment is made which concession will provide the better outcome, as this will depend on circumstances at the time of disposal, including whether the small business CGT concession eligibility requirements are satisfied and the size of the capital gain. This creates uncertainty regarding the value of the concession and may make it difficult for founders and advisers to assess the long-term tax consequences of an investment.

Further clarification is also required regarding the election's operation. In particular, it is unclear whether the choice between the small business CGT concessions and the IBCC is made on a disposal-by-disposal basis or applies more broadly to a founder's shareholding. Additional guidance would assist taxpayers and advisers in understanding the practical operation of the proposed rules.

Recommendation

We recommend that the Government:

- clarify how and when the election between the small business CGT concessions and the IBCC is made, including whether it operates on a disposal-by-disposal basis;
- publish worked examples comparing outcomes under each pathway to assist founders and advisers;
- explain the policy rationale for requiring significant investors to choose between the concessions rather than allowing the ordinary ordering rules to apply; and
- provide further information on the extent to which the IBCC is expected to deliver an additional benefit to founders who may already qualify for the small business CGT concessions.

Interaction with existing innovation incentives

The consultation paper indicates that the proposed IBCC is intended to operate alongside existing measures that support innovation and investment, including the ESS Start-Up Concession, the ESIC regime, the R&DTI, and the VCLP and ESVCLP programs.

Further guidance is needed on how the IBCC will interact with these existing regimes in practice. In particular, it is unclear whether the various innovation requirements, eligibility tests and record-keeping obligations are intended to operate consistently or independently across the different programs.

Many innovative businesses may qualify for, or seek to qualify for, more than one of these programs during their lifecycle. Differences in definitions, thresholds and qualification criteria may increase complexity for founders, employees, investors and advisers. This would be inconsistent with broader efforts to simplify the tax system and improve certainty for taxpayers.

Recommendation

We recommend that Treasury provide further guidance on the interaction between the IBCC and existing innovation incentives, including the ESS Start-Up Concession, the ESIC regime, the R&DTI, and the VCLP/ESVCLP programs. The Government should also consider whether eligibility thresholds and tests can be aligned with existing rules where appropriate to reduce complexity and compliance costs.

Carried interest for Venture Capital General Partners

The consultation paper proposes that carried interests received by general partners of VCLPs and ESVCLPs be eligible for the IBCC, recognising that carried interest is taxed on capital account but generally does not have a cost base to which indexation can be applied. We support the recognition that carried interest may require different treatment under an indexation-based CGT regime and agree that some form of concessional treatment may be appropriate.

However, the consultation paper does not explain how the proposed eligibility criteria for the IBCC are intended to apply to carried interest arrangements. The concession is otherwise designed around investments in shares issued by qualifying start-ups, and relies on criteria such as the share issue date, the company's age and turnover, innovation requirements, and a five-year minimum holding period. Carried interest is fundamentally different in nature. It generally represents an entitlement to a share of fund profits once specified performance hurdles have been met, and may relate to a portfolio of investments acquired at different times and disposed of over a number of years.

This raises a number of practical questions that are not addressed in the consultation paper. It is unclear how the five-year holding period would be measured for carried interest entitlements, whether the innovation and active business requirements would need to be satisfied by each underlying portfolio company or assessed at a fund level, and how the proposed lifetime cap would operate where an individual receives carried interest from multiple funds throughout their career.

There is also uncertainty regarding how the concession would be attributed to the ultimate recipient. Carried interest is commonly held through partnership and management structures rather than as a direct investment in the underlying start-up. Further clarification is required regarding how benefits are intended to flow through these structures and how eligibility will be determined where multiple entities are involved.

Without specific rules, applying the IBCC to carried interest may create significant uncertainty for taxpayers and advisers and increase the risk of disputes over eligibility and the calculation of concession benefits. Given the distinct nature of carried interest arrangements, dedicated legislative rules may be required rather than relying on provisions designed for direct shareholdings in innovative start-ups.

Recommendation

We recommend that the legislation provide specific rules addressing the application of the IBCC to carried interest arrangements, including:

- how the five-year holding period is measured for carried interest entitlements;
- whether the innovation and active business requirements are assessed at the portfolio company level or the fund level;
- how the lifetime cap applies where carried interest is received from multiple funds or portfolio investments; and
- how concession benefits are attributed through partnership and management structures.

We also recommend that the Government consider whether dedicated legislative provisions are required to accommodate the unique characteristics of carried interest arrangements.

Foreign investment considerations

The consultation paper proposes that the IBCC will not be available to companies, foreign residents or superannuation funds. While we recognise that foreign residents are not generally eligible for the existing CGT discount, we encourage the Government to consider the broader implications of excluding foreign investors from the proposed concession. Innovative Australian businesses, particularly in sectors such as biotechnology, medical technology and deep technology, often rely on foreign capital, expertise and international networks to support growth and commercialisation.

Given the important role foreign investment plays in the start-up ecosystem, further explanation would be helpful on how the exclusion of foreign residents from the IBCC aligns with the Government's broader objective of encouraging investment in innovative Australian businesses. The Government should also consider whether the cumulative effect of recent and proposed tax changes affecting foreign investors could have unintended consequences for Australia's attractiveness as a destination for innovation-related foreign investment.

Recommendation

We recommend that the Government provide further explanation of the policy rationale for excluding foreign residents from the IBCC and consider whether the interaction of this exclusion with other recent tax changes could affect investment in innovative Australian businesses.

Follow-on investment rounds

Start-ups commonly require multiple funding rounds before they become commercially viable or reach an exit event. Early investors frequently participate in follow-on capital raisings to avoid dilution of their ownership interests, provide ongoing support to the business, and meet additional funding requirements as the company grows. The consultation paper does not clearly explain how the proposed eligibility requirements, particularly the innovation, age, turnover and independence tests, will apply to subsequent investments made by existing shareholders. This creates uncertainty as to whether follow-on investments will qualify for the concession on the same basis as an investor's original investment, or whether each funding round will need to be assessed separately.

The proposed rules may unintentionally discourage legitimate follow-on investment if existing investors cannot determine whether subsequent investments will remain eligible for the concession. This is particularly relevant for innovative businesses that require ongoing capital over an extended period before reaching commercial maturity, including biotechnology, medical technology and deep-tech businesses. Investors should not be placed at a disadvantage simply because a successful company requires multiple rounds of funding as it progresses through its growth and commercialisation phases.

Consideration should also be given to situations where a company satisfies the relevant eligibility requirements when an investor first acquires shares but subsequently exceeds the turnover threshold, no longer meets the innovation criteria, or undergoes changes in ownership as part of later capital raisings. Clarity is required to ensure that investors can participate in future funding rounds with confidence, without having to reassess complex eligibility criteria each time additional capital is raised.

Recommendation

We recommend that Government clarify the treatment of follow-on investments, including whether existing investors can continue to access the concession for later funding rounds, how the eligibility tests apply to subsequent share issues, and whether investors can rely on an earlier determination of eligibility without reassessing company-level criteria for each capital raising.

Corporate restructures and successor entities

Start-ups commonly undertake restructures as they grow, seek investment, enter new markets, protect intellectual property, or prepare for a future sale or capital raising. These restructures may include the establishment of holding companies, intellectual property transfers, share-for-share exchanges, acquisitions, demergers, and other changes to group structures. In many cases, these transactions are undertaken for legitimate commercial reasons and do not alter the underlying economic ownership of the business.

The consultation paper does not address how these events may affect access to the proposed concession. This creates uncertainty for founders, employees and investors who may satisfy all eligibility requirements when shares are originally acquired but subsequently participate in a restructure that is outside their control or necessary to support the growth of the business.

It is unclear whether a restructure could result in a loss of eligibility due to the issue of replacement shares, changes in ownership interests, the transfer of business assets or the creation of new entities within a group. It is also unclear how the concession would apply when a start-up is acquired by another entity, when a holding company is inserted above an existing structure, or when intellectual property is transferred to a separate entity as part of a commercialisation strategy. These transactions are common in the start-up environment and may occur well before an investor has satisfied the five-year holding period.

Without appropriate continuity rules, investors may lose access to the concession despite maintaining their economic investment in the business and acting consistently with the policy objective of supporting long-term investment in innovative Australian companies. This outcome could discourage legitimate commercial restructures and create unnecessary complexity and compliance costs.

Recommendation

We recommend that the legislation clarify the treatment of restructures, acquisitions, and successor entities, and consider introducing continuity or rollover rules to ensure investors are not disadvantaged by genuine commercial transactions. In particular, investors should be able to retain access to the concession where there is no substantive change to their underlying economic interest in the business.

Record-keeping and compliance obligations

The consultation paper provides limited guidance on documentation and record-keeping requirements for the innovation test and other eligibility criteria. The consultation paper suggests that innovative start-ups should retain documentation such as business plans, commercialisation strategies and competitor analyses to demonstrate satisfaction of the innovation principles. In practice, many start-ups may not have fully developed commercialisation strategies or detailed competitor assessments at incorporation or during the early stages of development. Requiring such documentation as evidence of innovation may impose burdens that are inconsistent with the commercial reality of early-stage businesses.

Questions also remain regarding who is responsible for maintaining records, how long records must be retained, and what evidence investors will be expected to produce. The proposed concession may not be claimed until many years after the original investment is made. By that time, key personnel may have left the business, records may no longer be readily available, and investors may have little or no ability to obtain historical information from the company. This issue is particularly relevant where companies fail, are acquired, restructure, relocate records, or cease operating altogether.

The proposal appears to place significant reliance on company-level information to determine eligibility, even though the tax benefit is ultimately claimed by individual investors. Investors may therefore be exposed to compliance risks arising from matters outside their knowledge or control. This is especially problematic where investors are minority shareholders, former employees or ESS participants who may have limited access to company records years after acquiring their shares.

The requirement to assess innovation principles, active asset status, turnover thresholds, incorporation age, holding periods and lifetime caps may also create overlapping record-keeping obligations for taxpayers and advisers. These obligations would add to existing tax record-keeping requirements and may increase compliance costs, particularly where historical documentation must be retained for lengthy periods to support future CGT outcomes.

Consideration should therefore be given to establishing clear and practical evidentiary requirements, including whether investors can rely on company certifications or other forms of contemporaneous documentation. A certification process at the time shares are issued may significantly reduce future disputes and provide greater certainty for both investors and the ATO.

Recommendation

We recommend that the legislation provide clear rules regarding record-keeping obligations, including who is responsible for maintaining records, the period for which records must be retained, and the evidence investors may rely upon to demonstrate eligibility. Consideration should also be given to allowing investors to rely on company certifications, binding determinations, or other contemporaneous evidence, rather than requiring that eligibility be substantiated many years after the investment was made.

Risk of future disputes

Our overarching concern is that the proposed framework may appear straightforward when an investment is made but become highly contentious when a capital gain is realised many years later. The proposed concession relies on a number of eligibility criteria that may be difficult to verify long after the relevant shares were acquired, particularly where the company has grown significantly, been restructured, acquired, or ceased operating.

The proposed innovation principles require the exercise of judgment and may be open to differing interpretations by taxpayers, advisers, the ATO, and the courts. Questions may arise as to whether a business had sufficient growth potential, scalability, broader market opportunities or competitive advantages at the time shares were issued. These assessments may become increasingly difficult as time passes, and contemporaneous evidence becomes less readily available.

The proposed framework also relies heavily on company-level information to determine eligibility, even though the tax benefit is ultimately claimed by individual investors. Investors may have limited access to information needed to demonstrate that the company satisfied the innovation, active asset, turnover, or age requirements when the shares were issued. This issue is particularly relevant for minority investors, former employees, and ESS participants who may no longer have any connection with the company when they dispose of their shares.

Further uncertainty may arise when companies undertake multiple funding rounds, restructures, acquisitions, or changes in business activities after the shares are issued. Without clear legislative rules, investors and advisers may be required to revisit historical facts and circumstances many years later to determine whether the concession remains available. This creates compliance costs and increases the risk of disputes regarding matters that may be difficult to verify or substantiate after a significant period of time.

A concession designed to encourage investment in innovative businesses should provide certainty when an investment decision is made. Investors should not be required to bear the risk that eligibility may be challenged years later due to evidentiary difficulties or differing views on subjective eligibility criteria.

Recommendation

We recommend that the regime be designed to provide greater certainty at the time shares are issued, including through objective eligibility criteria, company certifications, binding determinations or safe harbour rules. Retrospective review should be limited to cases involving fraud, misrepresentation or material omission.